

1 Peter R. Afrasiabi (Bar No. 193336)
2 pafrasiabi@onellp.com
3 Jenny S. Kim (Bar. No. 282562)
4 jkim@onellp.com
5 **ONE LLP**
6 4000 MacArthur Blvd.
7 East Tower, Suite 500
8 Newport Beach, CA 92660
9 Telephone: (949) 502-2870
10 Facsimile: (949) 258-5081

11 *Attorneys for Plaintiff*
12 *Michael Grecco Productions, Inc.*

13 **UNITED STATES DISTRICT COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA**
15 **SOUTHERN DIVISION**

16 MICHAEL GRECCO
17 PRODUCTIONS, INC. a California
18 corporation,

19 Plaintiff,

20 v.

21 SHUTTERSTOCK, INC. a Delaware
22 corporation; KOBERT MEDIA an
23 unknown entity dba VOLLEYPOST;
24 and DOES 1-10 inclusive,

25 Defendants.

Case No. 2:19-cv-01153-DMG (AFMx)
Hon. Dolly M. Gee

JOINT RULE 26(f) REPORT

Scheduling Conference

Date: August 9, 2019

Time: 9:30 a.m.

Courtroom: 8C

Plaintiff Michael Grecco Productions, Inc. (“Plaintiff” or “Grecco”) and Defendants Shutterstock, Inc. (“Shutterstock”) and Defendant Kobert Advanced Media Ltd. an entity doing business as Volleypost (erroneously sued as “Kobert Media dba Volleypost”) (collectively, “Defendants”) hereby submit the following Rule 26(f) Report following their Rule 26(f) conference of counsel.

I. REPORT PURSUANT TO THE COURT’S ORDER SETTING SCHEDULING CONFERENCE (DKT. NO. 28)

A. Discovery

1. Initial Disclosures

The parties do not propose modifying or changing the form or requirements of initial disclosures under Rule 26(a), and agree to exchange initial disclosures by **August 23, 2019**.

2. Preservation of Discoverable Information

The parties do not anticipate any issues regarding the preservation of discoverable information.

3. Discovery Plan

The parties propose conducting discovery in two phases: (1) discovery relating to fair use, the safe harbor defense provided by the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. §§ 512 *et seq.*, and the extent of and entitlement by Plaintiff to damages, including the ownership, creation, and validity of the asserted copyrights, and valuation of a license to the asserted copyrights, which may permit early resolution of key issues; and (2) all remaining issues. The parties propose reserving 120 days to conduct discovery on the Phase I issues, and if appropriate, to file early summary judgment motions.

The parties will serve written discovery (including requests for production of documents, requests for admissions, and interrogatories) and take depositions pursuant to the Federal Rules of Civil Procedure. The parties will stipulate to the entry of a mutually agreed form of protective order to preserve the confidentiality of

1 sensitive and/or proprietary information before serving responses to discovery. The
2 parties do not anticipate the need for any other order to impose changes to the rules
3 regarding discovery.

4 The parties propose expert disclosures and a discovery cut-off date pursuant
5 to the schedule attached as **Exhibit A**.

6 **B. Law and Motion Matters**

7 The parties anticipate that they will file a motion for summary judgment,
8 partial summary judgment, or summary adjudication. Dispositive motions will be
9 filed and noticed to be heard on or before the final motion cut-off date.

10 The parties propose a motion cut-off date pursuant to the schedule attached as
11 **Exhibit A**.

12 **C. Settlement**

13 The parties have engaged in preliminary settlement discussions. Both parties
14 are always willing to discuss the possibility of settlement as a means to dispute
15 resolution. The parties request a neutral selected from the Court's Mediation Panel
16 (ADR Procedure No. 2). The parties propose an ADR completion date pursuant to
17 the schedule attached as **Exhibit A**.

18 **D. Trial and Pretrial Schedule**

19 The parties estimate 3-5 days for trial. The parties propose trial and pretrial
20 conference dates pursuant to the schedule attached as **Exhibit A**.

21 **E. Additional Parties**

22 The parties do not anticipate adding other parties to the action at this time.

23 **F. Jury Trial**

24 Plaintiff has requested a jury trial.

25 **G. Other Issues**

26 The parties stipulate and agree that pursuant to Federal Rule of Civil
27 Procedure 5(b)(2)(E), service of any paper in this action (e.g., written discovery and
28 responses, motions, etc.) may be accomplished by sending the paper via electronic

1 means (e.g., email). Documents are timely served by email where the email is sent
2 by 11:59 pm Pacific Time on the date due. For the avoidance of doubt, the parties
3 also agree that consistent with Federal Rule of Civil Procedure 6(d), for purposes of
4 computing deadlines for responses to pleadings or discovery requests when such
5 deadlines are triggered by service of a document, the additional 3 days granted for
6 service under Rule 5(b)(2)(C) (mail), (D) (leaving with the clerk), or (F) (other
7 means consented to) will **not** apply when the document is also served via electronic
8 means.

9 The parties further agree that (1) upon request, the parties will provide
10 editable forms of written discovery requests to facilitate preparation of the
11 responses; (2) document subject to the claims of attorney/client privilege and/or trial
12 preparation materials and/or attorney work product that were created after
13 commencement of this action need not be included in any privilege log; and (3) a
14 party shall have at least sixty (60) days after the production of documents to produce
15 a privilege log.

16 **H. Severance, Bifurcation or Other Ordering Proof**

17 The parties do not anticipate the need for severance, bifurcation, or other
18 order regarding the order of proof.

19 **I. Synopsis**

20 **1. Plaintiff's Statement**

21 This is a straightforward civil action against Defendants for their acts of
22 copyright infringement in violation of the United States Copyright Act, 17 U.S.C. §§
23 101 *et seq.* Plaintiff, an award-winning commercial photography company, owns the
24 copyright to many stylized and valuable photographs of celebrities. One such
25 photograph is at issue in this case: the rare and iconic photograph of Snapchat co-
26 founders Evan Spiegel and Bob Murphy (the "Snapchat Photo"). Plaintiff alleges
27 that Defendant infringed Plaintiff's copyrights in the Snapchat Photo. In particular,
28 Defendant Snapchat—a sophisticated and hugely profitable company whose very

1 business is to license copyrighted works to other parties for commercial
2 exploitation—failed to obtain a license from Plaintiff before reaping for itself and
3 Defendant Volleypost the very benefits under the Copyright Act that Plaintiff was
4 entitled to enjoy.

5 Defendants have filed an Answer denying liability and asserting twenty-seven
6 affirmative defenses. Plaintiff denies that Defendants are entitled to any of their
7 affirmative defenses.

8 **2. Defendant’s Statement**

9 Plaintiff claims to own the copyright to a series of conventional portrait
10 photographs of Snapchat co-founders Evan Spiegel and Bob Murphy, captured in
11 2013, and first published in *Forbes* magazine in January, 2014 (the “Original
12 Snapchat Photo”). Shutterstock is an image-licensing website that, among other
13 services, offers licenses to customers for stock images submitted by third party
14 users who represent and warrant ownership of all rights to the images submitted.
15 A third party user submitted to Shutterstock a photograph that incorporated certain
16 elements of the Original Snapchat Photo, while adding additional content,
17 including the *Forbes* masthead and a superimposed magnifying glass (the
18 “Transformed Snapchat Photo”). Volleypost is an Internet news website that
19 licensed the Transformed Snapchat Photo from Shutterstock pursuant to a standard
20 license permitting access to, and use of, multiple images for a modest flat fee.
21 Defendants deny liability based on several defenses, including the DMCA’s safe
22 harbor and fair use; even if liability could be shown, however, Defendants acted
23 innocently, not willfully; and finally, the reasonable market value of a license for
24 the Original Snapchat Photo is nominal, in any event. Contrary to Plaintiff’s
25 exorbitant demands and its contention that the Original Snapchat Photo is “rare
26 and iconic,” it is a stale image that is one of many fungible conventional portraits
27 in a series of images of no-longer-newsworthy subjects.

J. Amended Pleadings

The parties do not anticipate amending the pleadings at this time.

K. Issues to Be Determined by Motion

Plaintiff believes that at least the following issues should be resolved by motion:

- Whether Defendants are entitled to the fair use defense; and
- Whether Defendants are entitled to the safe harbor defense provided by the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. §§ 512 *et seq.*

II. JOINT REPORT PURSUANT TO FED. R. CIV. P. 26(f)

L. Nature and Basis of Claims and Defenses (Fed. R. Civ. P. 26(f)(2))

See Sections I.I.1 and I.I.2, *supra*.

M. Possibilities for Prompt Settlement (Fed. R. Civ. P. 26(f)(2))

See Section I.C, *supra*.

N. Discovery Plan (Fed. R. Civ. P. 26(f)(2) & (3))

1. Changes in the Time, Form or Requirement for Initial Disclosures (Fed. R. Civ. P. 26(f)(3)(A))

See Section I.A.1, *supra*.

2. Subjects on Which Discovery May be Needed (Fed. R. Civ. P. 26(f)(3)(B))

The parties anticipate taking discovery on all issues relating to Plaintiff’s claims asserted in the Complaint and Defendants’ defenses asserted in the Answer, including at least infringement of the Snapchat Photo; Defendant’s defenses of fair use, DMCA safe harbor; willfulness; the ownership and creation of the Snapchat Photo; the reasonable market value of the Snapchat Photo; and other issues relating to Plaintiff’s alleged damages.

1 **3. ESI Issues (Fed. R. Civ. P. 26(f)(3)(C))**

2 The parties do not anticipate that there will be issues about preserving,
3 accessing, or producing discoverable information, including electronically stored
4 information (“ESI”). Whenever practicable, the parties agree to produce ESI with
5 standard metadata fields intact, either through the use of a “load file” or by
6 producing ESI in native format.

7 **4. Privilege or Protection (Fed. R. Civ. P. 26(f)(3)(D))**

8 The parties agree that the inadvertent production of privileged documents will
9 be subject to Federal Rule of Evidence 502. The parties may request that the Court
10 enter a separate protective order regarding confidential and privileged documents, to
11 be negotiated by the parties and submitted to the Court by stipulation.

12 **5. Limitations on Discovery (Fed. R. Civ. P. 26(f)(3)(E))**

13 *See* Section I.A.3, *supra*.

14 **6. Other Orders (Fed. R. Civ. P. 26(f)(3)(F))**

15 As stated in Section II.4, *supra*, the parties may seek entry of order pursuant
16 to Rule 26(c), and if so, will submit a stipulated protective order. The parties do not
17 request that the Court issue other orders or under Rule 16(b) and (c).

18 **III. JOINT REPORT PURSUANT TO LOCAL RULE 26-1**

19 **O. Complex Case (Local Rule 26-1(a))**

20 The parties agree that this case is not complex.

21 **P. Motion Schedule (Local Rule 26-1(b))**

22 *See* Sections I.B & I.K, *supra*, and **Exhibit A**.

23 **Q. ADR (Local Rule 26-1(c))**

24 *See* Section I.C, *supra*.

25 **R. Trial Estimate (Local Rule 26-1(d))**

26 *See* Section I.D, *supra*.

27 **S. Additional Parties (Local Rule 26-1(e))**

28 *See* Section I.E, *supra*.

T. Expert Witnesses (Local Rule 26-1(f))

See Exhibit A.

Dated: July 26, 2019

ONE LLP

By: /s/ Jenny S. Kim

Peter R. Afrasiabi

Jenny S. Kim

Attorneys for Plaintiff

Michael Grecco Productions, Inc.

DATED: July 26, 2019

DAVIS WRIGHT TREMAINE LLP

SCOTT R. COMMERSON

BRENDAN N. CHARNEY

By: /s/ Brendan N. Charney

Scott R. Commerson

Attorneys for Defendants

SHUTTERSTOCK, INC. and

VOLLEYPOST

ATTESTATION

Pursuant to Civil Local Rule 5-4.3.4(a)(2)(i), I, Jenny S. Kim, hereby attest that all other signatories listed, and on whose behalf the filing is submitted, concur in the filing's content and have authorized the filing.

/s/ Jenny S. Kim

Jenny S. Kim

EXHIBIT A

MATTER	JOINTLY REQUESTED DATE	TIME
TRIAL (Jury) Duration Estimate: 3-5 days	October 14, 2020 (Tuesday)	8:30 a.m.
FINAL PRETRIAL CONFERENCE (“FPTC”)	September 15, 2020 (Tuesday)	2:00 p.m.
MATTER	JOINTLY REQUESTED DATE	
Phase I Discovery Begins (fair use, the safe harbor defense provided by the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. §§ 512 <i>et seq.</i> , and valuation of a license to the asserted copyrights)	August 17, 2019 (Wednesday)	
Phase II Discovery Begins (all issues)	December 9, 2019 (Monday)	
Amended Pleadings and Addition of Parties Cut-Off (includes hearing of motions to amend)	February 28, 2020 (Friday)	
Non-Expert Discovery Cut-Off (includes hearing of discovery motions)	June 5, 2020 (Friday)	
Motion Cut-Off (filing deadline)	June 12, 2020 (Friday)	
Initial Expert Disclosure & Report Deadline	July 10, 2020 (Friday)	
Rebuttal Expert Disclosure & Report Deadline	August 7, 2020 (Friday)	
Settlement Conference Completion Date	August 14, 2020 (Friday)	
Expert Discovery Cut-Off (includes hearing of discovery motions)	August 21, 2020 (Friday)	
Motions in Limine Filing Deadline	August 25, 2020 (Tuesday)	
Opposition to Motion in Limine Filing Deadline	September 1, 2020 (Tuesday)	